

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Appln. No. : 10/010,114 Confirmation No. 5743, JUN 26 2006
Applicant : Raymond H. Boutin
Filed : November 13, 2001 US PATENT & TRADEMARK
TC/A.U. : 1632 OFFICE
Examiner : D. Crouch
Docket No. : AHPICUSA
Customer No. : 38199

Mail Stop 16
Director of the US Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22323-1450

REQUEST FOR REFUND

Sir:

This paper is being filed to request a refund for the fee paid for filing of a second Reply Brief, dated January 24, 2006, totaling \$500.00. The filing of a second Reply Brief was necessitated by the Examiner's failure to comply with the new rules of 37 C.F.R. §41.37(c) (effective September 13, 2004) and failure to submit copies of documents relied upon by the Examiner, as well as the vacating of the Examiner's Answer filed May 3, 2005. The facts supporting a refund of the fee for filing the second Reply Brief are as follows:

1. On May 3, 2005, the Examiner filed an Examiner's Answer responsive to the Appeal Brief filed on February 17, 2005 by the Applicant in the present application. Applicant thereafter filed a Reply Brief on June 29, 2005.
2. Subsequent to the filing of the Reply Brief, The Board of Patent Appeals and Interferences entered an Order Returning Undocketed Appeal to Examiner on November 17, 2005. The Appeal Board indicated in the Order that the reason for remand was the Examiner's failure to comply with the new rules of 37 C.F.R. §41.37(c)

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(effective September 13, 2004), and the Examiner's failure to provide copies of documents relied upon in the Examiner's Answer filed May 3, 2005.

3. As part of the Appeal Board's Order, the Board required the Examiner to "... vacate the Examiner's Answer mailed May 3, 2005 and issue a revised Examiner's Answer ..." (emphasis added).

4. The Examiner filed a new Examiner's Answer on December 6, 2005 in accordance with the Order of the Appeal Board.

5. On January 24, 2006, Applicant filed a second Reply Brief in order to maintain the appeal.

Applicant is entitled to a refund of \$500.00, the fee incurred in filing a second Reply Brief, for the following reasons. Under 37 C.F.R. §41.50,

(a) (1) ... The Board may also remand an application to the examiner.

(2) If a supplemental examiner's answer is written in response to a remand by the Board for *further consideration of a rejection* pursuant to paragraph (a)(1) of this section, the appellant must within two months from the date of the supplemental examiner's answer [either (i) reopen prosecution or (ii) request that the appeal be maintained by filing a reply brief].

Further, MPEP §1207.05 (III) provides that:

The Board may remand an application to the examiner for a reason that is **not** for further consideration of a rejection ... The examiner may provide a supplemental examiner's answer ... Appellant **may** respond [to the supplemental answer] by filing a reply brief ...

Based upon the above, in view of the Examiner's errors in preparing the Examiner's Answer and in failing to provide copies of necessary documents, the appropriate course of action was for the Appeal Board to remand the application **NOT** for further consideration of a rejection, but rather to correct the Examiner's errors. Such an

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action would have yielded a supplemental examiner's answer in accordance with 37 C.F.R. §41.50(a)(2).

However, in view of the Appeal Board's requirement that the Examiner's Answer be *vacated* and the subsequent filing of a *new* Examiner's Answer, procedures not contemplated within the rules nor described in the Manual of Patent Examining Procedure, the filing of a second Reply Brief by Applicant was necessary in order to ensure the maintenance of Applicant's appeal. The effect of the vacating of the Examiner's Answer on Applicant's Reply Brief, filed June 29, 2005, is unclear.

Under 37 C.F.R. §1.26 (a), "[t]he Director may refund any fee paid by mistake or in excess of that required." Under the present circumstances, the filing of a second Reply Brief (and the accompanying fee) was necessitated by the actions of the Examiner and the Appeal Board, but was in excess of that required because the circumstances underlying the Appeal Board's remand should have resulted in the procedure outlined in the rules and the MPEP. If the appropriate procedures had been followed, a supplemental examiner's answer would have been filed based on a remand *not* for further consideration of a rejection and the filing of Applicant's second Reply Brief would have been optional.

Accordingly, Applicant respectfully requests that the USPTO refund the fee paid for filing the second Reply Brief (filed January 24, 2006) to the undersigned's deposit account, Deposit Account No. 08-3040.

Respectfully submitted,

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Attorneys for Applicants

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FORM**

(to be used for all correspondence after initial filing)

Total Number of Pages in This Submission

Application Number	10/010,114
Filing Date	November 13, 2001
First Named Inventor	Raymond H. Boutin
Art Unit	1632
Examiner Name	D. Crouch
Total Number of Pages in This Submission	4
Attorney Docket Number	AHP1CUSA

ENCLOSURES (Check all that apply)

<input type="checkbox"/> Fee Transmittal Form	<input type="checkbox"/> Drawing(s)	<input type="checkbox"/> After Allowance Communication to TC
<input type="checkbox"/> Fee Attached	<input type="checkbox"/> Licensing-related Papers	<input type="checkbox"/> Appeal Communication to Board of Appeals and Interferences
<input type="checkbox"/> Amendment/Reply	<input type="checkbox"/> Petition	<input type="checkbox"/> Appeal Communication to TC (Appeal Notice, Brief, Reply Brief)
<input type="checkbox"/> After Final	<input type="checkbox"/> Petition to Convert to a Provisional Application	<input type="checkbox"/> Proprietary Information
<input type="checkbox"/> Affidavits/declaration(s)	<input type="checkbox"/> Power of Attorney, Revocation	<input type="checkbox"/> Status Letter
<input type="checkbox"/> Extension of Time Request	<input type="checkbox"/> Change of Correspondence Address	<input checked="" type="checkbox"/> Other Enclosure(s) (please identify below):
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<input type="checkbox"/> Information Disclosure Statement	<input type="checkbox"/> Request for Refund	
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<input type="checkbox"/> Reply to Missing Parts/ Incomplete Application	<input type="checkbox"/> Landscape Table on CD	
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SIGNATURE OF APPLICANT, ATTORNEY, OR AGENT

Firm Name	HOWSON AND HOWSON		
Signature			
Printed name	Cathy A. Kodroff		
Date	1/24/2006	Reg. No.	33,980

CERTIFICATE OF TRANSMISSION/MAILING

I hereby certify that this correspondence is being facsimile transmitted to the USPTO or deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on the date shown below:

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AN 24 2006
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REPLY BRIEF

Sir:

This Reply Brief is timely filed in response to the new Examiner's Answer mailed December 6, 2005. In view of the vacating of the Examiner's Answer, and the submission of a new Examiner's Answer, Applicant presents this second Reply Brief in order to assure that Applicant's arguments responsive to the vacated Examiner's Answer are considered. Further, should the new Examiner's Answer be deemed a "supplemental examiner's answer" for the purpose of further consideration of a rejection within the meaning of 37 C.F.R. §4150, Applicant hereby requests that the appeal be maintained. Applicant has updated the page and line references made in the Reply Brief filed June 29, 2005, in order to track the new Examiner's Answer.

The fee of \$500.00 for filing this Reply Brief is attached hereto. The Director is hereby authorized to charge any deficiency in any fees due with the filing of this paper, or credit any overpayment, to our Deposit Account, No. 08-3040.

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